

MEETING MINUTES
ORANGE COUNTY PLANNING BOARD
MARCH 20, 2019
SPECIAL MEETING

MEMBERS PRESENT: Lydia Wegman (Chair), At-Large Chapel Hill Township Representative; Kim Piracci, At-Large; Adam Beeman, Cedar Grove Township Representative; Carrie Fletcher, Bingham Township Representative; Patricia Roberts, Cheeks Township Representative; Paul Guthrie, At-Large Chapel Hill Township; Randy Marshall, Bingham Township Representative; Hunter Spitzer, At-Large; David Blankfard, Hillsborough Township Representative;

MEMBERS ABSENT: Buddy Hartley, Little River Township Representative; Laura Nicholson, Eno Township Representative;

STAFF PRESENT: Craig Benedict, Planning & Inspections Director; James Bryan, Staff Attorney; Michael Harvey, Current Planning Supervisor; Tina Love, Administrative Assistant III

AGENDA ITEM 1: CALL TO ORDER

Chair Lydia Wegman called the meeting to order.

AGENDA ITEM 2: PUBLIC CHARGE

Chair Lydia Wegman waived the reading of the Public Charge

AGENDA ITEM 3: CHAIR COMMENTS

AGENDA ITEM 4: UNIFIED DEVELOPMENT ORDINANCE (UDO) TEXT AMENDMENTS – REORGANIZATION OF TABLES OF PERMITTED USES – To continue review of and make a recommendation to the BOCC on proposed amendments to the UDO that would reorganize the Tables of Permitted Uses in response to the *Byrd v. Franklin County* judicial decision and modify other sections to ensure consistency within the ordinance. These amendments are scheduled for BOCC public hearing on April 16, 2019.

PRESENTER: Michael Harvey, Current Planning Supervisor

Michael Harvey: I'm going to make a very brief summary. So obviously, you have an abstract outlining why we are here this evening. There are tweaks that have been made to the packet and I want to review them very quickly. You also have a revised attachment one that spells out the changes that have occurred within the proposed table. At your last meeting there were concerns over the term burden of persuasion and what it meant. There were questions asked which I forwarded to the attorney's office. I'll let Mr. Bryan speak to those in a moment. There was also a request to allow retreat centers in additional non-residential zoning districts as permitted use, so you'll note from the abstract we've allowed them within the neighborhood commercial, community commercial, general commercial, Economic Development Buckhorn low intensity, Economic Development Eno low intensity, Economic Development Hillsborough office retail districts at the request of the Planning Director. There are tweaks to Section 2.10.3 and this is where we start getting into the discussion on modifications adding language associated with an applicant's burden of proof. As pointed out at the last meeting the sentence reads as follows, 'applicants shall have the burden of establishing by competent material and substantial evidence in the form of testimony, exhibits, documents, models, plans and other materials, that the application meets the requirements for approval of a Variance it's application meets'. So that is in Section 2.10.3 and 2.11.3 what I would like the Board to do before we get into the discussion of burden of persuasion, because regardless of whatever happens with burden of persuasion, I'd like there to be a motion to accept the amendment to Section 2.10.3 and Section 2.11.3 replacing meetings with meets.

Randy Marshall: So moved

MOTION by Randy Marshall to accept the amendment to Section 2.10.3 and Section 2.11.3 replacing meetings with meets. Seconded by Carrie Fletcher.

VOTE: Unanimous

Michael Harvey: I would also like there to be a motion acknowledging and accepting the changes to the Table of Permitted Uses that you saw last month to include Retreat Centers in the districts I named.

57

58 Randy Marshall: So moved

59

60 MOTION by Randy Marshall to acknowledging and accepting the changes to the Table of Permitted Uses to include Retreat
61 Centers in neighborhood commercial, community commercial, general commercial, Economic Development Buckhorn low
62 intensity, Economic Development Eno low intensity, Economic Development Hillsborough office retail districts. Seconded
63 by Hunter Spitzer

64 VOTE: Unanimous.

65

66 Michael Harvey: Let me introduce Mr. James Bryan of the county attorney's office to discuss burden of persuasion.

67

68 James Bryan: I'm a staff attorney here in Orange County. Michael mentioned to me that there were some particular
69 concerns you have been wrestling with regarding the Table of Permitted Uses. I drafted a memo. The last two pages are
70 the actual questions that Michael forwarded to me with the answers, but I thought it would be easier to just work from the
71 beginning. Let's start at the beginning of why staff came up with changes to the Table of Permitted Uses. There was a
72 court case in 2015, Franklin vs. Byrd, in which the state said all the local governments along with the state have been
73 doing this wrong for a long time. Zoning is a derogation of property rights and anything ridding of somebody's property
74 rights is a higher standard than normal stuff, so you have to be clear when you do that. Our current UDO is written
75 similarly to many jurisdictions in the state where the state says we're going to tell you what you can and can't do. The
76 Byrd court said, no, you don't tell people what they can do, it's assumed they can do whatever they want, and you have to
77 tell them what they can't do. You have to very clear and when there's ambiguity it will go in favor of the property owner.
78 You can think of the Table of Permitted Uses as things you can and can't do. There is also a middle ground that says
79 these are the different categories and we're going to bump you in to whatever is closest to it. If you want to prohibit
80 something, you have to be clear about it. An example of how the UDO was constructed for that is with the definition of
81 large daycare homes which provides daycare for more than 5 but fewer than 16 children within a residence. The idea was
82 it was regulating within the definition; 17 children wouldn't be captured by that definition since it's 5 to 16. Under the
83 current UDO if you have 17 children in the home, we were presuming that you weren't allowed because you didn't fall
84 under the definition. Byrd flips that and says if you're not a large daycare home, which you are not with 17 kids, then
85 you're not regulated and not listed in the Table of Permitted Uses so it's assumed that you can go about your business.
86 Group homes have always been a difficult subset of Land Use Categories because there's state and federal laws about
87 group homes like halfway homes and addiction centers. Both the state and federal have particular regulations for group
88 homes through the ADA, Americans with Disabilities Act and through fair housing. The problem is they overlap. Under the
89 old system where you said, I'll tell you what you can do, it's okay to regulate them like that. With this one, it's going to be
90 tough to have a very explicit set of uses for that. A lot of other jurisdictions have added something to their development
91 ordinance which you can call reasonable accommodation which the law requires for ADA and fair housing. It's a great
92 time to address that because it also addresses the idea that we want broad categories, so they are regulated. The federal
93 and the states are saying you can't be so broad with these protected classes, so we're being broad but also giving them an
94 escape of reasonable accommodations. Durham and Ashville have adopted this, and now staff is proposing this. There
95 are different ways to approach this. You could have very precise definitions of land use categories to meet state and
96 federal guidelines, or you could develop your own reasonable accommodation section. It is both common and useful to
97 steal from other jurisdictions as Durham has already adopted this so go ahead and steal from them. This helps serve two
98 purposes; the first is saving staff time and the other is when something is complex and can lead to litigation, you look to
99 the court to see whether it is applicable to you. Durham and Ashville has been untested so it's more of a prospective use.
100 Having it match as closely as possible influences the reliance on it. Durham's reasonable accommodation has a section
101 on burden of proof which includes burden of persuasion. When first reviewed with Michael, he had eliminated that section,
102 and I told him if there's any change that's going to impact how it's relied upon later, maybe it makes a difference, I don't
103 know? Michael stated he would put it back in, but by putting it back in, it doesn't line up with the rest of our UDO as the
104 rest of the UDO has different processes for Special Use Permits, Appeals, Interpretations, and others. It talks about what
105 is basically burden of proof, but it doesn't use the same words in the same way that Durham did for theirs. When reading
106 our UDO, it has different words for the same process. There's construction, the way the courts are going to read this when
107 reviewing it which says words have meaning and purpose and when they are done differently in different sections that's
108 intentional for different purposes. So, staff met in the middle and used the Durham one, I think verbatim, and then
109 changed the other sections of the UDO. It's important to know because there's a context of it that the words have meaning
110 and has to be the same in different places. The first, is the construction in which words have their normal every day
111 meaning and unless defined will be from the dictionary. I would believe that persuasion here has to be looked at in the
112 context of that it is usually used in a board's determination for a quasi-judicial determination. I don't think you have a

113 burden of persuasion for a staff level determination in the UDO. You are probably going to rely on the fact that in the
114 statutes the language talks about substantial evidence where you need competent, material, and substantial evidence
115 sufficient to make your proof. Material is something related to the thing at hand and competence is that which could be
116 used in a court, it's reliable. Substantial is that which a reasonable mind would regard as being sufficient to support a
117 specific conclusion which can be found on the third page under 1, the last sentence. Substantial evidence is that which a
118 reasonable mind would regard as being sufficient to support a specific conclusion. This to me is a fairly low bar.
119 Reasonable minds can disagree, but there are some things that are just not disagreeable. It is what a reasonable mind
120 would regard as being sufficient to support a specific conclusion. The next question forwarded by Michael is, the need for
121 language in the question given; how the UDO is structured with respect to Variances, Interpretations, and SUPs. This is
122 again the idea that discrepancies can have major impact. If you say staff such as Michael and Craig Benedict in multiple
123 sections and then say staff such as Michael, this is construction and there's an omission. Craig was left off on that last
124 one and you might say Craig hadn't been hired when that part was drafted, but the court upon reviewing it will see it as a
125 purposeful omission, something that was meant for Michael but not Craig. This is the reason the different sections should
126 be as uniform as possible. The greater the variance between the different sections the more ambiguous and less likely it
127 is to be upheld. The third concern; Board members are concerned that requests could be denied because someone
128 decides even with expert testimony in the evidence you have not convinced me. By statute, everything has to be based
129 upon competent material and substantial evidence and local rules have to be followed. It can be tinkered with to create
130 more procedures and processes and can be exhaustive in description, but you run the risk of not doing it perfectly and
131 anything in the definitions will be upheld. If you don't say anything, you can likely rely on the statutes and precedent.

132

133 Lydia Wegman: I don't have a problem with the burden of proof, but what is puzzling to me is that the applicants have the
134 burden of the competent material, substantial evidence, what meets the requirements for approval of the variance. I don't
135 understand what the burden of persuasion language adds, and it seems to confuse the issue. Although Durham has put it
136 in, it has not been legally tested, and is not persuasive to me.

137

138 James Bryan: My job is to work for the Board when they're considering this, that it is legally sufficient, and that they're
139 aware of the risks. My concern is that you all understand this and understand the risk involved.

140

141 Lydia Wegman: I'm not understanding what the risk is of not having the sentence, further the applicant shall have the
142 burden of persuasion on those issues.

143

144 James Bryan: If you don't have Durham's verbatim, you can't rely on it.

145

146 Lydia Wegman: But Durham's has never been tested, this is their creative approach.

147

148 James Bryan: Right.

149

150 Lydia Wegman: What if ours was tested first?

151

152 Hunter Spitzer: Do you know what they have done to justify doing this?

153

154 James Bryan: No.

155

156 Carrie Fletcher: So, we are just following them just because?

157

158 James Bryan: No, I don't believe so. One reason we are following them is because staff has been working on this for
159 years. We could come up with a whole new one but then Michael would have to come up with all new language, it would
160 have to be reviewed by me, he would have to bring to you, and it would be a longer process. This is a quick process, and
161 I've told Michael that what Durham does is legally sufficient.

162

163 Lydia Wegman: What would make it legally insufficient to leave out the sentence about the burden of persuasion. I
164 understand you to say that we are just going to follow what they are doing.

165

166 Hunter Spitzer: Why it is insufficient without the burden of persuasion, it is because then we can't rely on their standard?

167

168 James Bryan: It is not legally insufficient.

169
170 Lydia Wegman: It would not be legally insufficient if we deleted that sentence, is that correct?
171

172 James Bryan: Yes.

173
174 Lydia Wegman: I understand why you need a statement about burden of proof and where it falls, but it's that last sentence
175 that's hanging me up.
176

177 James Bryan: I would encourage you to allow me to explain burden of proof, burden of persuasion, and burden of
178 production. It's one thing to think it's legally sufficient so we can do it, but we should all have our own reason. If I had my
179 way, we would just rely on the statutory language, but that is not how our UDO is set up. Our UDO is hundreds of pages
180 reiterating and expanding upon the statutes. We talk about burden of proof, but we don't use those words so much and
181 use the statutory language some but it's really a modification of everything. Durham has their own modification, different
182 but fairly similar. The burden of proof is an umbrella term that is usually broken down into burden of production and
183 burden of persuasion. Production could be the tangible items, the witness or the documents, and the persuasion could be
184 the arguments that support that. It could also be in different context that the burden of production is when the burden
185 shifts. If you were in civil court in the state of North Carolina, you would file a lawsuit with the first motion of summary
186 judgement. You would have a hearing to ask the judge to throw out the case just based upon what you have because you
187 don't need a trial. This has a different standard for it than a trial. There you have a different burden of production than you
188 would have at the trial. In that context, it has a different meaning, so you have to look at what you have here. I think what
189 Durham does is fine. It is a little wordy, not very user friendly, and has too much legalese, but I don't believe ours to be the
190 gold standard either. There are hundreds of pages in the UDO and there are a lot of things that I don't think are best
191 practices, but if it's not being changed right now it has opened up a Pandora's box to mess with everything. By peeling
192 away at the UDO, you bring up other issues and that's how the reasonable accommodation came in. I think the staff has
193 done a good job about addressing the problems that came up and the next thing was this burden of persuasion and how to
194 get it to either to match Durham's or to meld with ours.
195

196 David Blankfard: In our UDO is there a definition for burden of persuasion? When I looked it up, there is an article from
197 Law Cornell that says the definition for burden of persuasion. Can we have that put in as this is what this means, along
198 with the need for factuals, information, and for it to be presented?
199

200 James Bryan: Yes, but I recommend against it. It makes sense to clarify, but if you have a definition of it, you are defining
201 a term used by Durham and Durham might define it differently and you therefore lose that benefit from it. If you are silent
202 then you could say, yes, that is what we meant. I think you are not at a risk when you say, yes, that is what we meant
203 because I think burden of persuasion and burden of proof is so well established in the law that is it competent, material,
204 substantial evidence for the standards found in the UDO.
205

206 Hunter Spitzer: I am still confused with how burden of persuasion is distinct from burden of proof. How is adding
207 persuasion something more than just burden of proof? What does it add that we wouldn't have without it, and what makes
208 that different than just the regular burden of proof defined in case law?
209

210 James Bryan: I think what I am hearing is that you've added that the burden of proof is broken down into production and
211 persuasion. Production is the documents and persuasion is the arguments. In the UDO, we are explicit that the burden is
212 on the applicant to produce the documents but didn't say anything about the arguments. It was implicit and this is making
213 it explicit.
214

215 Hunter Spitzer: This definition is only added in 2.10.3 and 2.11.3?
216

217 Michael Harvey: No, it was added to 2.10.3, 2.11.3, 5.3.2, the sections dealing with Variances, Interpretations and
218 Special Use Permits.
219

220 Hunter Spitzer: Okay.
221

222 Carrie Fletcher: Part of the comments were to keep it so the average person could do it on their own without legal
223 assistance and to keep it cost effective. You understand the terminology, but the average person may not and therefore
224 you are going to end up requiring the applicant to hire legal help.

225

226 James Bryan: I understand that, and I think you are defeating the purpose if you don't expand it. It's 600 pages and not
227 user friendly to begin with. If you were to leave the burden of persuasion out and leave it implicit, then those wily attorneys
228 are going to be only ones able to pick that out while the average person wouldn't look for the loopholes. This is closing the
229 loopholes and making it harder for attorneys to get around the system.

230

231 Randy Marshall: This seems to create loopholes. If there is no concrete criteria for persuasion, any attorney can
232 challenge not being persuaded when there is no criteria or definition for persuasion. It is left up to the governing board to
233 say, whatever you put out there, I am not persuaded. It provides an undue decision-making authority on the governing
234 board who rules. I would prefer to see Orange County go in it's own direction and then if there's a problem with that, it will
235 surface. I can't see that someone would come and say they will take us to court because we didn't add the phrase.

236

237 James Bryan: Either John or I are at the boards and we would advise against those arguments. The enabling statutes
238 say that someone has to have substantial material and competent evidence and case law indicates that once you have
239 that you have a right to the permit. That is the burden of proof. The different parts of it about the production of documents
240 and persuasive arguments are subparts to that.

241

242 Adam Beeman: I have applied for permits in this County since 2008, and I just don't see it as being a fair process to
243 someone who can't afford deep pockets to get out of it. If you just scratch persuasion off, I am happy. But you are telling
244 me I have to persuade you yet don't give me any concrete steps to hit. That is a problem for me. It seems objectified. I
245 read your paragraph that if I provide all of this stuff then I deserve it, so then scratch out persuasion because I have
246 accomplished all of that. Why do I have to persuade you? If I come in and present my evidence and testimony, I have
247 either persuaded you or not.

248

249 James Bryan: It is a problem with semantics, but I am telling you what the law says. The law says you are always
250 persuading the Board. The Board has discretion.

251

252 Adam Beeman: That is my problem. It seems like a backdoor to say no to any project regardless if I qualify or not.

253

254 James Bryan: It can't be that.

255

256 Adam Beeman: It sounds like it. I am a layperson not a legalese, and it doesn't make sense to me. When I read it, it
257 sounds like you are discouraging me from doing it. I am at the mercy of presenting my case instead of handing you the
258 facts.

259

260 James Bryan: The facts aren't the facts.

261

262 David Blankfard: I have an example of the facts aren't the facts. I was on the Board of Adjustment and we had an
263 applicant come in and say they wanted to have a kennel put in. They had their own realtor come in and say it's going to
264 maintain or enhance their property, but the neighbors had another expert say, no, it is not going to. We had to pick
265 between the two on who was most persuasive.

266

267 Randy Marshall: Persuasive or factual?

268

269 David Blankfard: They were both qualified but just had different opinions.

270

271 Michael Harvey: They drew different conclusions from the facts.

272

273 Adam Beeman: And that is the problem with persuasion that I have. Mr. Harvey mentioned earlier that any time you go
274 for these permits, you would be advised to have a lawyer. You are setting me up right out of the gate to have to spend
275 money.

276

277 Craig Benedict: I don't know if this is an operable solution. One suggestion was to put a definition and James said
278 probably not. Sometimes in state construction of statutes there are some unknowns and what is done later is they ask for
279 an attorney general opinion on what that really means. Could the attorney's office put an attorney's opinion of how we
280 operate that burden of persuasion in an argument and explain? If we could get some sort of attorney opinion outside of it

281 that says this is what we mean by the argument. This is a typical argument that should go with the proof to have the
282 whole package; the production, the argument, and the overarching burden of proof.

283
284 Randy Marshall: This hasn't been in there before. How we have suffered by not having this clause in our UDO?

285
286 James Bryan: There's always the potential of litigation for ambiguity or not following local ordinance.

287
288 Randy Marshall: But we have not had any challenge up to this point that would seem to suggest that we to have this in
289 there.

290
291 James Bryan: To my knowledge, we have not.

292
293 Randy Marshall: How do you define reasonable?

294
295 James Bryan: Up until that last clause, I think that's spot on. Going back to David's example regarding the kennel. David
296 and his co-members on the Board had to vote, and one of them could have said I think it's going to decrease the value
297 while four of them could have has said it would increase the value. If they give the applicant the permit and it gets
298 appealed to Superior Court, the court will review the decision and ask if they had competent material and substantial
299 evidence. If the applicant did, then the court would find in their favor. It is a discretionary decision that the Board is
300 allowed to make.

301
302 Randy Marshall: If we allow the clause to stay, what prevents us from adding another clause that says whoever is not
303 persuaded has to provide us with the reasons they are not persuaded?

304
305 Michael Harvey: That already does happen.

306
307 Randy Marshall: You have to put it in there so whoever reads it has it concretely in front of them and it's not implied that
308 they have it. If someone says they are not persuaded, after the burden of proof has been met, I think they should have an
309 obligation to the applicant to delineate the reasons why they are not persuaded which provides recourse to contest the
310 decision preventing them from getting what they are seeking.

311
312 Kim Piracci: Is this is one issue we have tonight?

313
314 Lydia Wegman: Yes.

315
316 Kim Piracci: I'm a gemologist; and at some point, it's not up to me to give a gemology lessons to my clients if that person
317 has hired me for my expertise. There's a hang up on the word persuasion, and he has said several times that it is not the
318 legal standard. The legal standard is this other thing. These three professionals are kind of in agreement that these
319 wordings should be in here and said it's an improvement over what we had. Michael has said it's already if you are not
320 persuaded you have to say why and yet it seems to keep going back and forth. At some level, we have to trust our paid
321 professionals and that's what I would like to do at this time. I don't see an end to this discussion. Even though I get your
322 point, I trust him because he's a legal expert.

323
324 Adam Beeman: I don't think we should be making it more difficult for normal people to understand and go through the
325 process. You are making it to the point where I have to hire a lawyer to do this so they can interpret the law for me.

326
327 Kim Piracci: Is it not already that way?

328
329 Hunter Spitzer: From precedent it seems like this is already the expectation. It was an implied expectation that the
330 applicant would have the burden of persuasion and now we are putting it into concrete text. If you are going for a Special
331 Use Permit or a Variance you will probably need a lawyer anyway, so I believe the process is the same, and I don't think
332 this makes it any more difficult if you already have a lawyer.

333
334 Adam Beeman: No, but it can discourage someone from doing it in the first place. We can vote, but we will obviously we
335 will not get anywhere with me.

336

337 Lydia Wegman: Where you say the applicant shall have the burden of persuasion on those issues. What issues are you
338 referring to? If I'm understanding correctly James, you're trying to say the first sentence is about the burden of production
339 and the second sentence is about the burden of persuasion?
340

341 James Bryan: I don't have it in front of me.
342

343 Lydia Wegman: When you were drawing the distinction, you were saying the burden of proof consists of the burden of
344 production and the burden of persuasion.
345

346 James Bryan: I believe the first sentence was what's currently in our UDO and what I believe is the definition of burden of
347 production.
348

349 Lydia Wegman: We have this new burden of persuasion language which was not there before with reference to issues, but
350 the first sentence doesn't actually reference specific issues.
351

352 James Bryan: It should reference the standards for whatever section is applicable.
353

354 Lydia Wegman: It's confusing for an applicant to know the issues. If we are going to keep the burden of persuasion
355 language, I think it needs to be clarified.
356

357 James Bryan: It might have been a copy and paste from Durham where it should have been specified.
358

359 David Blankford: Since burden of persuasion is a legal term that is not quite obvious to laypeople, is there a way that we
360 can italicize it so people can Google "burden of persuasion" as opposed to Googling each word, because it means a whole
361 host of legal implications.
362

363 James Bryan: I always recommend that ordinances be unaltered and just plain, simple rules. At 600 pages it will never be
364 user friendly. What you do then is create forms and pamphlets to educate the public. I think forms like the application, a
365 fill in the blank type of thing, along with pamphlets.
366

367 Kim Piracci: Does Michael have to go back and correct or improve that imperfection that you brought up?
368

369 Michael Harvey: You don't want to know what Michael is thinking right now.
370

371 Kim Piracci: Can we call this to vote or do we have to come back for it because there's an imperfection?
372

373 James Bryan: I would always advise against coming up with language on the spur of the moment, but if you were to say
374 relevant issues I think that clarifies it. It's one word and describes the issues.
375

376 Michael Harvey: I'm not signing off on that. I am not comfortable with that suggestion at this time.
377

378 Kim Piracci: So, we can't vote on this tonight, anyway?
379

380 Lydia Wegman: We can vote on the language as it sits before us.
381

382 Michael Harvey: This was drafted after a 45-minute discussion between Mr. Bryan and myself to address concerns of legal
383 sufficiency.
384

385 Craig Benedict: I like the brochure idea or something that explains how we implement this. If we cannot put it as a
386 definition with an elaboration of it, which isn't being suggested, then the language as it is would be useable with a
387 brochure. This would explain what we are trying to achieve.
388

389 Michael Harvey: Are you going to come up with a brochure?
390

391 Lydia Wegman: The brochure also isn't the standard of court with review. It could be helpful to applicants, but it won't
392 address the question if it were challenged. The brochure wouldn't be admissible.

393

394 Craig Benedict: The brochure would be a help to the customer.

395

396 Lydia Wegman: It's a good idea but doesn't address our comfort with UDO language.

397

398 Craig Benedict: I agree.

399

400 Randy Marshall: Before we vote, I am going to say something with the burden of persuasion language I'm voting against.
401 I'm not persuaded that we have to have it because Durham had it. We've never had it in here and it's never been a
402 problem.

403

404 Paul Guthrie: Has any court of competent jurisdiction defined what we're now saying seems to be a problem?

405

406 James Bryan: I haven't looked. It's pretty well settled law because the statute is explicit about competent material and
407 substantial evidence. What is substantial has been litigated extensively but questioning the very foundation has not.
408 Franklin vs. Byrd is how this came up. There is always a chance that the foundation gets torn up, but this is how it's been
409 going for a long time.

410

411 Paul Guthrie: What worries me is the turmoil that might occur over trying to justify and accept these definitions. You may
412 find that the rulings will take on and destroy further protections than we have and not just those under the court's view at
413 that time. It seems like an issue that is one of those that can't be solved simply and depending on the case that comes
414 forward that case may be awarded for the wrong part of information but set the precedent for all the rest. Is there any way
415 to avoid that and still maintain the standard that Michael is trying to justify?

416

417 James Bryan: I don't think that there's any way to fully avoid it. The law is an evolving thing. You can be conservative in
418 your approach by seeing what the common approach is and what is most legally defensible.

419

420 Lydia Wegman: If we take a vote, can we vote on whether we approve or disapprove this language? I think several of us
421 are uncomfortable with the second sentence, but not the first. If we were to vote on that, can this go forward to the Board
422 of County Commissioners?

423

424 Craig Benedict: You can vote with both sentences or one; it's your recommendation. The Commissioners will see your
425 recommendation and vote for or against it.

426

427 Lydia Wegman: I'm trying to say I think we can take a vote and move on beyond us to the Board of County
428 Commissioners.

429

430 Michael Harvey: I think the Board just needs to take action as it sees fit.

431

432 **MOTION** by Hunter Spitzer to approve the Statement of Consistency as contained in Attachment 2 and to approve revised
433 UDO text amendment package in contained in Attachment 3 and refer the Board of County Commissioners to our
434 concerns with the language under the sections discussed this evening and on March 6, 2019 but to approve the document
435 as it stands. Seconded by Kim Piracci

436

437 Lydia Wegman: So, basically you are voting to approve it but just advise them that we had some concerns.

438

439 Hunter Spritzer: Yeah.

440

441 Carrie Fletcher: I would like to know what your feeling are, I would like to know.

442

443 Michael Harvey: I quite frankly feel that there are some statements that have been made here tonight that are inconsistent
444 with facts and how this language was added. That's very unfortunate. I think that there is and has always been a burden
445 of persuasion for an applicant engaging in a Variance, Interpretation or Special Use Permit. That is just simple fact. An
446 applicant has the obligation to persuade whatever Board he or she is going before that they are correct and that the
447 information they are providing demonstrates the project complies with applicable standards. How they persuade that
448 Board they are correct is with the submission of competent material and substantial evidence in the form of testimony,

449 exhibits, documents, models, plans and other materials that the applicant is intending to use to persuade whatever board
450 the request meets the requirements for whatever, Variance Interpretation or Special Use Permit. I think that James's
451 concern about establishing references to this existing burden, while some may believe is implicit in the ordinance, that the
452 specific language needs to be added was reasonable which was why I added it. The fact that you all don't agree, that's
453 your prerogative but some of the comments made about how this language got in here and what my purported motives are
454 is a little unfortunate and somewhat insulting.

455
456 James Bryan: Wait, from me?

457
458 Michael Harvey: From the group.

459
460 James Bryan: Oh, you can clarify if I was wrong, if I misspoke.

461
462 Michael Harvey: This language was put in there to address a concern over legal sufficiency and after 45 minutes of you
463 and I coming to an understanding of what those concerns are, I thought what was crafted was reasonable. I don't
464 necessarily believe this was added....it wasn't something that I thought was 100% necessary to add to begin with which is
465 why you and I had 45 minute of discussion on it. I understood you concern and attempted to address it because part of
466 my role with this project is to address concerns over legal sufficiency.

467
468 James Bryan: Ok

469
470 Carrie Fletcher: From what I am seeing, as everyday citizens, I think I feel that we have an obligation to try to protect the
471 everyday citizenry and if that came across then I am not going to apologize but I understand that you see it from a different
472 side than we do and if that's confrontational, I apologize and I don't mean to come across.....

473
474 Michael Harvey: I guess what I'm getting offended at is that the perception that I am not interested in protecting the
475 common citizenry or that I am simply adding this language as some form of barrier for common citizens hindering their
476 ability to get approvals of variances, interpretations, or special use permits. Further that somehow I concocted all of this all
477 on my own which is inconsistent with the facts. That is incredibly insulting.

478
479 Carrie Fletcher: Maybe we all get a little over defensive about it. I don't mean to be offensive but I think in this
480 environment of government everyone gets a little edgy about making sure we're protected in a way then verbiage is
481 correct.

482
483 Lydia Wegman: So, I'm just going to jump in here and say I think that, I hope we all respect one another and that I feel
484 and I think this is true of the Board that we all very much respect Michael, James and Craig and the work that you do and
485 that we recognize that you are trying to serve all the citizens of Orange County in a fair way recognizing that some of these
486 things are complicated and difficult for individuals to make sense of and you are trying to be as clear as possible so that
487 everyone looks at this code and understands what is required. No one is suggesting, I don't believe anyone is in this room
488 is suggesting that there was anything other than that motivating this effort. The fact that some of us may be confused or
489 concerned about this language is the way we are reading it but that has nothing to do with what you were trying to do in
490 writing it. I certainly, we all understand that you are trying to help citizens of Orange County move forward with their
491 applications in these SUPs and Variances.

492
493 Michael Harvey: Regardless of the vote that is about to occur, and I am going to make the same comment in any other
494 motions that are made this evening, I like to offer a friendly amendment to the motion to approve.

495
496 Lydia Wegman: Please do.

497
498 Michael Harvey: In our haste to get this done, there are a couple of section references that I neglected to update, and I've
499 just discovered. So, with your indulgence, what I would like to point out is that the amendment, the approval would need to
500 include updating section reference in what is Section 2.10.2 Applicant Requirements Subsection B number 4; the
501 narrative outlining the answers to the five required findings detailed within it reads currently Section 2.10.3 that is now
502 actually become Section 2.10.4 with the re-numbering.

503

504 Next, Section 2.10.5 Additional Criteria for Authorized Variances Special Flood Hazard Areas in addition to the criteria
505 contained within it says Section 2.10.3 that is the same reference that needs to be updated to Section 2.10.4 that is the
506 provision dealing with authorized variances.

507
508 Section 2.10.6 Modifications of the Impervious Surface Ratios in Subsection E reads that such requests may be requested
509 through one of the following provisions; through variance procedures of the Board of Adjustment as described in this
510 subsection. The subsection used to be 2.10.5 it is now re-numbered to 2.10.6.

511
512 Last, required Findings of Fact that is listed in Section 2.10.10 that is now become Section 2.10.4.

513
514 So regardless of whatever motion, whatever happens with this vote, I'd like there to be an acknowledgement and any
515 subsequent motions of those corrections as identified by staff.

516
517 Lydia Wegman: Ok, thank you

518
519 Craig Benedict: That can be incorporated by the person who made the motion and the person who seconded is in
520 agreement that can be amended.

521
522 Hunter Spitzer: I would like to amend my motion to include what Michael said.

523
524 Kim Piracci: I second that amendment.

525
526 **VOTE:** 4-5
527 Motion Failed

528
529 **MOTION** by Adam Beeman to strike burden of persuasion out of the UDO and to include the amendment made by Michael
530 Harvey relating to updating section references. Seconded by Randy Marshall.

531
532 Michael Harvey: So, your motion would be to eliminate within Section 2.10.3 the sentence "further the applicant shall have
533 the burden of persuasion on those issues" to eliminate from Section 2.11.3 Burden of Proof to eliminate "further the
534 applicant shall have the burden of persuasion on those issues" and last in Section 5.3.2 Special Use Permits "further the
535 applicant shall have the burden of persuasion on those issues".

536
537 Adam Beeman: And to include changes as identified by staff updating references in Sections 2.10.2., 2.10.5, and 2.10.6
538 as recommended by staff.

539
540 **VOTE:** 7-1
541 Motion Passed with Hunter Spitzer abstaining from the vote.

542
543 *Staff note: Abstaining from a vote is not an option the County's advisory board policy allows but where a member has a*
544 *conflict of interest the member may be excused by majority vote of the advisory board.*

545
546 Kim Piracci: Did I understand you to say you didn't want to put it in either?

547
548 Michael Harvey: No ma'am.

549
550 Lydia Wegman: He was persuaded by his conversation with James is what I understood and it was something that made
551 sense to him.

552
553 **AGENDA ITEM 5: ADJOURNMENT**
554 The meeting was adjourned by consensus

555
556
557